FILED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No. 72-1208

VALLEY OIL COMPANY,
Petitioner

vs.

CITY OF GARLAND, TEXAS,
Respondent

Petition for a Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

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Fort Worth, Texas 76102
Counsel for Petitioner

March 2, 1973

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No.----------

VALLEY OIL COMPANY,
Petitioner

vs.

CITY OF GARLAND, TEXAS,
Respondent

Petition for a Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

Petitioner prays a writ of certiorari issue to review the judgment and opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, entered in this proceeding on June 22, 1972.

CITATION TO OPINIONS BELOW

The judgment of the 191st Judicial District Court of Dallas County, Texas granting judgment in favor of the Petitioner is printed in Appendix 1 hereto, *infra* p. 14. The judgment and order of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, reversing and rendering the judgment of the District Court is printed in Appendix 1 hereto, *infra*, p. 16, and is reported in 482 S.W.2d 342.

JURISDICTION

The judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District was entered on June 22, 1972 (Appendix 1B, *infra*, p. 16). A timely motion for re-hearing was denied by the Court of Civil Appeals on July 13, 1972. (Appendix 1B, *infra*, p. 23). A timely application for writ of error, Docket No. B-3536, was denied by the Texas Supreme Court on November 8, 1972, and a timely motion for re-hearing of application for writ of error was denied by the Texas Supreme Court on December 6, 1972 (Appendix 1C, *infra*, p. 24). This petition for certiorari was filed within 90 days of that date. The jurisdiction of this court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1

Whether a city zoning ordinance imposing a fine upon a single self-service gasoline station if such station would not cease its prior non-conforming use of certain real property as a self-service gas station after a given date constitutes an unconstitutional taking of private property without just compensation and without due process in violation of the Fifth and Fourteenth Amendments to the Federal Constitution.

2

Whether a city ordinance allowing a self-service gas station only one year in which to recover its investment of $24,000 in the station and land if operated as a prior non-conforming use, where the annual income

from such station is approximately $3500 and the value of such land without the station would be not over $1,000, constitutes an unconstitutional taking of private property without just compensation and without due process in violation of the Fifth and Fourteenth Amendments to the Federal Constitution.

STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions involved are as follows:

Due Process and Just Compensation for Property Clauses of the Fifth Amendment to the United States Constitution:

> " . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution:

> " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ordinance #1818 of the Respondent City of Garland is set forth verbatim in Appendix 2 hereto, *infra*, p. 26.

Article 1111c, Section 2(c) of the Texas Penal Code is set forth verbatim in Appendix 3 hereto, *infra*, p. 30.

STATEMENT OF THE CASE

Preservation Of Constitutional Questions Below:

Petitioner raised its Federal Fifth and Fourteenth Amendment Constitutional questions of denial of due process and taking of property without just compensation in the trial court in the following portion of petitioner's "Plaintiff's Original Petition":

> " . . . the attempt (of the City) to eradicate such business by ordinance is a misuse of its police power and is an unconstitutional taking of plaintiff's private property without compensation and without due process of law." (Para. VII, Plaintiff's Original Petition).

The Court of Civil Appeals in reversing and rendering the judgment of the court below passed upon these constitutional claims of Petitioner as follows:

> "The question is whether under these circumstances the ordinance requiring discontinuance of the use in one year was unreasonable and arbitrary and therefore beyond the police power of the city to restrict the use of the property in the interest of public health, safety and general welfare, (Citations omitted). We hold that plaintiff had not shown the ordinance to be unreasonable and arbitrary . . . Since the city's potential jurisdiction had attached, plaintiff acted at its peril and now has no standing to complain that it has been deprived of its property without due process." (Appendix 1-B, *infra*, p. 20, 482 S.W.2d at 345, 346).

Petitioner preserved these same constitutional ques-

tions in its Application for Writ of Error addressed to the Texas Supreme Court as follows:

"SECOND POINT OF ERROR

The Court of Civil Appeals erred in not holding that the ordinance requiring discontinuance of petitioner's use in one year was unreasonable, arbitrary, capricious and illegal and therefore beyond the police power of the respondent city.

FOURTH POINT OF ERROR

The Court of Civil Appeals erred in not holding that petitioner proved the ordinance in question to be an unreasonable taking of its vested property rights without compensation and without due process of law as guaranteed by 14th Amendment to the United States Constitution.

FIFTH POINT OF ERROR

The Court of Civil Appeals erred in not holding or even addressing itself to petitioner's contention that the City of Garland was attempting to close petitioner's self-service station indirectly through its passing of the ordinance in question since it could not close the station directly through its ordinance against self-service stations." (Points of Error 2, 4, and 5, Plaintiff's Application for Writ of Error).

Facts:

Petitioner, Valley Oil Company, owns and operates self-service gasoline stations. On February 1, 1966, Valley Oil Company leased a service station which was at the time outside the city limits of Garland, Texas. The term of this lease was for fifteen years at

a total lease price of $13,500.00. On March 24, 1966, the Respondent first gave public notice that a public hearing would be held on April 5, 1966, concerning the adoption or Ordinance #1383, annexing, among other properties, the tract which Petitioner had leased.

Construction of a service station was started on May 2, 1966 and completed on May 10, 1966. The first sale of gasoline was on May 11, 1966. The property had been previously used as a gasoline service station.

On June 7, 1966, the City Council adopted the annexation ordinance as law.

Later, in 1966 the City of Garland passed an ordinance absolutely prohibiting the operation of self-service gasoline stations within the city limits. At that time the record reflects that there were no other self-service gasoline stations in Garland than Petitioner's. The Respondent tried unsuccessfully to enforce that ordinance against Petitioner, Valley Oil Company.

Petitioner continued to operate the property as a non-conforming use continuously from the date of annexation to the present time and the station is still in operation. In May of 1968 Valley Oil Company, relying on its prior continuous non-conforming use, purchased the property on which the service station was located for $20,000.00, because, all things considered, it was cheaper in the long run to purchase the property than to continue its operation under the lease.

In 1969, the Texas legislature passed Article 1111c, Section 2(c) of the Texas Penal Code, which, in effect, provides that cities cannot absolutely prohibit the op-

eration of self-service gasoline stations within city limits.[1] This article became effective September 1, 1969, and since that date the Petitioner has fully conformed with every requirement of that article, and with all regulations promulgated pursuant to it.

On August 4, 1970, some four and one-half years after petitioner leased the disputed tract, the City of Garland passed Ordinance #1818 which required Valley Oil Company to discontinue use of that property as a service station no later than August 4, 1971, or else suffer up to $200.00 per day fine for each day of operation after August 4, 1971. That ordinance is set forth in full in Appendix 2 hereto, *supra*, p. 26.

The Ordinance recites that this service station is a nuisance, a fire hazard, and is without sanitary toilet facilities. It further recites that the use of the land had been without water or sewer service, and that it has not been subdivided or plated. However, the transcript of the trial reveals no evidence that the service station was a nuisance. The Fire Marshall of the City of Garland testified that it was not a nuisance, and his only testimony concerning the station being a fire hazard was "I think self-service stations are unsafe", without any reference to specific violations on behalf of this station.

Prior to enactment of Ordinance #1818, the undisputed evidence shows that the City had never made any complaint that the Petitioner had failed to maintain proper sanitary toilet facilities, and, as a matter

[1]See Appendix 3 hereto for a full text of Article 1111c, Section 2(c) Texas Penal Code.

of fact, the first complaint of the lack of such toilet facilities came from a preacher who testified at one of the Board of Adjustment hearings with reference to this property. The preacher also stated that he had never complained of the lack of toilet facilities before that time. On May 28, 1970, immediately after the meeting, Port-o-let toilet facilities were installed and remain on the premises at this date.

There have been no incidents of fire or any occurrences of a dangerous nature since the station has been operating. Since this station began operation, it has continuously had an attendant on duty to observe that the safety rules are carried through by persons filling their tanks. At all relevant times the self-service gasoline station operating on this property has complied with the National Fire Underwriter's Code, which Code permits self-service gasoline stations.

All attempts to modernize the self-service station have been thwarted by the City by refusal of the City to issue the necessary permits. The undisputed testimony shows that the City will not permit any changes in any equipment connected to water, related to water, or electricity other than what they have already.

At the time the self-service station started operating, the area where it was located was sparsely settled with buildings and was on the fringe of town. There were no buildings close to the station. Almost all of the houses presently near the service station, including a church, have been built since the station began its operations on May 11, 1966.

The property on which the station is located has a 125 foot frontage and is approximately 75 feet deep.

The undisputed testimony shows that this piece of property, if it is limited to agricultural use, would be worth not over $1,000.00. Since June 7th, 1966, this property has been zoned by Respondent City of Garland for agricultural use.

Ordinance #1818 allowed only one year for amortization of the "non-recoverable investment" of Valley Oil Company. This was found to be $4,000.00, *exclusive of land*, but no allowance of any kind was made for the loss in value to the land if the land could not thereafter be used for some purpose other than agricultural.

Coupled with the land investment, Petitioner has $24,000.00 invested in property which it began to operate as a station before it was annexed by the Respondent. The Respondent has, in effect, allowed Petitioner to recoup only $5,000.00 worth of that investment.

In conclusion, it is clear that after Respondent discovered it could not close the station by enforcement of its void ordinance absolutely prohibiting operation of self-service gasoline stations, it chose to pass a new ordinance prohibiting only this one station.

REASONS FOR GRANTING THE WRIT

(a) The Ordinance Is Unconstitutional And Confiscatory Under The Taking Of Property Without Compensation And Due Process Clauses Of The Fifth And Fourteenth Amendments To The United States Constitution.

The Fourteenth Amendment to the United States Constitution prohibits the states from taking private property without just compensation to the same extent that the Fifth Amendment prohibits the federal government. *Chicago, B. & Q. R.R.* v. *Chicago*, 166 U.S. 226 (1897). While a governmental subdivision may validly regulate the use to which property is put pursuant to its police powers, "the governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited". *Nectow* v. *Cambridge*, 277 U.S. 183 at 188 (1920). Such restriction may not be imposed unless it bears a substantial relation to the public health, safety, morals, or general welfare. *Nectow* v. *Cambridge, supra*, at 188, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 at 395 (1926).

Not all state regulation of private property is that type of taking for which compensation must be paid by the state. *Megler* v. *Kansas*, 123 U.S. 623 at 668, 669 (1887). But it is well established that governmental action in the form of regulation may be so onerous that it constitutes a taking which constitutionally requires compensation. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). There is no set for-

mula to determine where regulation ends and taking begins.

It is submitted that the facts of the present case fall fairly within those facts present in *Dobbins* v. *Los Angeles*, 195 U.S. 223 (1904), and that this case is controlled by that decision. In that case, the City adopted an ordinance making it illegal to erect and maintain gasworks outside of a certain privileged district within the City. While this ordinance was in force, Plaintiff contracted for the erection of a gasworks within the privileged district, expended considerable money, and obtained necessary permits for erection of the project. After the foundation of the building had been laid, the City passed a second ordinance excising the land on which construction had begun from the privileged district, and thereafter began criminal prosecutions designed to halt construction.

In reversing and remanding the judgment of the Supreme Court of California, the Supreme Court held that this conduct was an arbitrary and discriminatory exercise of the police power which amounted to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment to the Federal Constitution. *Dobbins* v. *Los Angeles, supra*, 195 U.S. at 241. The court did not rely in its decision upon estoppel or waiver by the City when it issued the necessary building permits.

The decision was based squarely upon *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), which held that if an ordinance was enforced in such a manner as to work

a discrimination against a part of the community, for no lawful reason, such exercise of power should be invalidated by the courts. *Dobbins* v. *Los Angeles*, *supra*, 195 U.S. at 240.[2]

(b) The Loss To Petitioner Greatly Outweighs Any Benefit To The Public From Enforcement Of This Ordinance.

In the instant case, Petitioner acquired the disputed tract for a lease term beginning February 1, 1966, more than *seven weeks* before the issuance of public notice on March 24, 1966, preparatory to annexation of the property by the City. The City's *potential* jurisdiction could not possibly have attached before March 24, 1966. Moreover, actual self-service gasoline operations were begun on May 11, 1966, some *four weeks* prior to actual annexation by the City.

There is no evidence in this case that this particular station was a nuisance, a fire or health hazard, or unsafe. The only objections by citizens were those voiced by persons whose houses were erected *after* the station began operations.

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[2]For a recent application of this principle by the Court of Appeals for the Fifth Circuit on facts similar to the instant case, see *City of Miami* v. *Woolin*, 387 F.2d 893 (5th Cir . . . 1968). There, the court upheld a judgment against the City enjoining it from enforcing an ordinance which prohibited the erection of gasoline stations within 350 yards of a church, hospital, or school, or within 750 feet of another filling station. As in the instant case, the offending ordinance was passed after substantial investment by the Plaintiff. Uncontradicted testimony in that case showed that Plaintiff's property was worth $130,000.00 if usable as a service station, but otherwise, only $67,500.00 It is interesting to note in that case that the Plaintiff had *not* begun construction of a service station when the offending ordinance was passed, but had merely acquired the land before passage.

The City was on notice of the business nature of this property at the time of annexation since it had been previously used as a service station.

The purpose of passage of Ordinance #1818 is manifest. In 1966, the City passed an ordinance absolutely prohibiting all self-service gasoline stations. At that time, the record reflects that there were *no other* self-service gasoline stations in Garland than Petitioner's. This unconstitutional attempt failed. Then, more than four years later, and within one year of Texas legislation permitting self-service gasoline stations, the Respondent passed Ordinance #1818.

Ordinance #1818 is clearly unconstitutional. Petitioner stands to lose $19,000.00 (or 79%) of its capital investment as a result of the offending ordinance.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas.

Respectfully submitted,

JAKE C. COOK
702 Burk Burnett Building
Fort Worth, Texas
Counsel for Petitioner

March 2, 1973

Appendix 1: Orders, Opinions and Judgments Below

Appendix 1-A: Judgment of the 191st Judicial District Court of Dallas County, Texas

IN THE
DISTRICT COURT OF DALLAS COUNTY, TEXAS
191ST JUDICIAL DISTRICT

No. 71-5404-J

VALLEY OIL COMPANY
vs.
THE CITY OF GARLAND

JUDGMENT

On the 24th day of September, 1971, came on to be heard the above styled and numbered cause and came the Plaintiff and Defendant, in person and with their attorneys of record and announced ready for trial, and both waived a trial by jury, and the court having examined the pleadings and having heard the evidence and argument of counsel and being of the opinion that the resolution of the Board of Adjustment and the Ordinance in question should be set aside because of the lack of procedural due process:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the City of Garland's Board of Adjustment resolution dated March 18, 1970, and Ordinance No. 1818, passed August 4, 1970, by the City Council of the City of Garland, Texas, be set aside without prejudice for the City of Garland to initiate and prosecute the termination of the present use by the Plaintiff of its service station located on

the east line of North Glenbrook Drive, opposite the intersection of Daventry Drive, in the City of Garland, Texas, on any grounds alleged, anticipating that said Board of Adjustment will in accordance with the laws of the State of Texas and Ordinances of the City of Garland, conduct a substantially judicial type hearing, with all of the traditional concepts of due process, also without prejudice, to any other issues that might be lawfully raised in connection with the present use of said property, and Plaintiff is allowed to assert all the defenses it may have, and there should be no prejudice to Plaintiff's failure to give 10 day's notice of appeal of such Board of Adjustment's resolution as they were unsupported in their conclusion.

IT IS FURTHER ORDERED that the period for capital recovery, if applicable, shall start on March 18, 1970, and that Plaintiff and Defendant herein, each pay one-half of the costs of court, for which let execution issue.

All relief not herein granted is denied.

SIGNED AND ENTERED this 8 day of Oct., 1971.

/s/Spencer Carver
Judge Presiding

APPROVED BY:

/s/Jake C. Cook
Jake C. Cook, Attorney for Plaintiff

/s/Louis Mathis
Louis Mathis, Assistant City Attorney
for The City of Garland

Appendix 1-B: Opinion, Judgment and Order on Motion for Re-hearing of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

FROM A DISTRICT COURT
OF DALLAS COUNTY, TEXAS.

No. 17,891

CITY OF GARLAND, TEXAS,
Appellant

vs.

VALLEY OIL COMPANY,
Appellee.

The trial court granted an injunction restraining the city of Garland from enforcing an ordinance which required plaintiff Valley Oil Company to discontinue after one year the operation of a self-service gasoline station in an area where such use was forbidden by a general zoning ordinance. The city appeals. We hold the ordinance to be valid and dissolve the injunction.

By its first point the city contends that since plaintiff appeared before the board of adjustment, it cannot make a collateral attack on the action of the board by this suit for injunction, but is limited to direct review under Tex.Rev.Civ.Stat.Ann. art 1011g (Supp. 1972). This point is overruled. This suit does not attack the order of the board of adjustment, but rather the ordinance adopted by the city council on August 4, 1970. The only action by the board was a resolution adopted March 18, 1970 "that the station in question be phased-out in one (1) year's time from the date of

the Ordinance passed by the City Council." This resolution was not a final determination of the matter, since it had no force until action was taken by the city council. Apparently, it was only a recommendation. The city council expressly adopted this recommendation at its meeting on July 21. That decision was implemented by enactment of the ordinance in question on August 4, and the present suit was filed to restrain the enforcement of that ordinance.

Although article 1011g allows any person aggrieved by any decision of the board of adjustment to present to the court within ten days a petition showing that the decision of the board is illegal, no provision is made for similar review of the action of the city council. The property owner may maintain an independent action attacking such an ordinance on the ground that it is arbitrary and unreasonable. City of Amarillo v. Stapf, 129 Tex. 81, 101 S.W.2d 229 (1937); City of Carthage v. Allums, 398 S.W.2d 799 (Tex.Civ.App., Tyler 1966, no writ).

By its second and third points the city asserts that the trial court erred in requiring the board to furnish plaintiff a "substantially judicial type hearing with all of the traditional concepts of due process," and in determining the case on procedural due process without any pleadings to support such a determination. These points are sustained. The action complained of is not an order of the board, but an ordinance enacted by the city council. Plaintiff has made no attack on that ordinance for lack of procedural due process. The petition alleges that the attempt to enforce the ordi-

nance deprives plaintiff of its vested property rights without due process of law and that the ordinance "is an unreasonable, unnecessary, and unconstitutional exercise of the police power of said City, and deprives plaintiff of his private property rights without compensation and without due process of law, and will deprive plaintiff of its non-conforming use of the property." There is no allegation of lack of notice, denial of hearing, or any other procedural irregularity in enacting the ordinance. The judgment recites that the resolution of the board and the ordinance "should be set aside because of lack of procedural due process," but no procedural irregularities are specified, and plaintiff has not pointed out to us anything in the record which would support this recital. Consequently, the judgment below cannot be sustained on this ground, and we must examine the record further to determine whether plaintiff has established its allegations that the ordinance is void as unreasonable or as depriving plaintiff of property without due process of law.

By its remaining points the city seeks to sustain the ordinance on the ground that the trial court erred in holding that plaintiff had a valid nonconforming use, and in ruling that the ordinance requiring plaintiff to discontinue the use after one year was unreasonable and not supported by substantial evidence. These points are sustained.

The general zoning ordinance adopted in 1962 provides that all territory thereafter annexed should be temporarily classified as "agricultural district" until

permanent zoning is established by the city council. In January, 1966, before the land in question was annexed, the owners of the property leased it to Petro, Inc. for a term of fifteen years. The lease specified that the land should be used "for filling station, car-wash, drive in grocery, washateria or other affiliated business and for no other purpose." The annexation ordinance recites that it was published March 24, 1966, was "passed and approved on initial action" April 19, 1966, and was "passed and approved on final action" on June 6, 1966. In the interim between initial and final action, the station was built and plaintiff made its initial investment. Construction began May 2 and gasoline sales began May 11. In the same month plaintiff "took over" the lease and purchased the equipment from the lessee for $4,000. The value of the equipment at that time, according to plaintiff, was $1,500 for pumps, $934.40 for storage tanks, $1,475 for a building and $521.71 for inventory. Two years later, in May, 1968, plaintiff purchased the land for $20,000.

After plaintiff began operating the station a church was built on adjoining property and houses were built in a residential subdivision across the street. So far as the record shows, none of the land in the area other than plaintiff's service station is used for commercial or industrial purposes. On February 2, 1970 plaintiff received a notice from the city of a hearing before the board of adjustment to consider "termination and discontinuation of the non-conforming gas station." After two hearings before the board and one before the city council, the ordinance in question was passed

and approved requiring plaintiff to discontinue operation of the station within one year.

At the council hearing plaintiff admitted that all of the service station equipment could be moved. Evidence before the court shows that plaintiff operates a total of fifteen self-service stations, and that associated companies operate about four hundred and fifty stations. In answer to interrogatories, plaintiff stated that its net profits from the station for the fiscal years after beginning operation, without considering land cost, interest on the outstanding note or depreciation, were as follows:

1967	1968	1969	1970	1971
$2572	$4237	$3309	$3197	$3067.

On the same basis, plaintiff estimated its net profits from August 14, 1970 through August 14, 1971 would be $5,966.

The question is whether under these circumstances the ordinance requiring discontinuance of the use in one year was unreasonable and arbitrary and therefore beyond the police power of the city to restrict the use of property in the interest of public health, safety and general welfare. City of Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953). We hold that plaintiff has not shown the ordinance to be unreasonable and arbitrary. When plaintiff made its initial investment, it was charged with notice that the land was in the process of annexation and that upon annexation would be zoned so that its use as a service station would be prohibited. Since the city's potential jurisdiction had attached, plaintiff acted at its peril and

now has no standing to complain that it has been deprived of its property without due process. City of Dallas v. Meserole, 155 S.W.2d 1019 (Tex.Civ.App., Dallas 1941, writ ref'd w.o.m.). *Cf.* Houston Ice & Brewing Co. v. Kennan, 99 Tex. 79, 88 S.W. 197 (1905).

In the second place, the period of one year allowed before discontinuance of the station was not unreasonable in view of undisputed evidence that plaintiff had already recovered its initial investment of $4,000 several times over at the time the ordinance was adopted, and that in the one additional year allowed by the ordiance, plaintiff's expected profit would amount to almost 150 per cent of that investment, without considering removal and use of the equipment at other stations. An ordinance requiring termination of even a legal nonconforming use is valid if a reasonable time is allowed for recovery of the investment. Swain v. City of University Park, 433 S.W.2d 727 (Tex.Civ. App., Dallas 1968, writ ref'd n.r.e.), National Advertising Company v. County of Monterey, 1 Cal. 3d 875, 83 Cal.Rptr. 577, 464 P.2d 33 (1970).

Plaintiff contends that it should have been allowed enough time to amortize the $20,000 it paid for the land, since there was evidence that the land would be worth less than $1,000 on discontinuance of the station. This contention is not well taken because plaintiff bought the land well after annexation, when operation of the station was at best a nonconforming use under the applicable zoning ordinance and subject to involuntary termination on allowance of a reasonable per-

iod for amortization of the initial investment. An additional investment in a nonconforming use cannot extend the period of amortization or otherwise restrict the city's police power. This principle has been recognized in cases involving replacement of nonconforming structures and extensions of nonconforming uses. Since one of the legitimate objectives of zoning regulations is eventually to eliminate nonconforming uses, it has been held that a nonconforming structure cannot be replaced or substantially altered so as to prolong the nonconforming use. Goodrich v. Selligman, 298 Ky. 863, 183 S.W.2d 625 (1944); Cole v. City of Battle Creek, 298 Mich 98, 298 N.W. 466 (1941). Likewise, it has been held that the owner of a nonconforming service station, who, with actual or constructive notice of a zoning ordinance, purchases an adjoining lot for the purpose of building a larger station, cannot complain of any hardship by denial of such extended use. DeWitt v. Town of Brattleboro, 262 A.2d 472 (Vt. 1970).

For the reasons stated, we hold that the ordinance in question has not been shown to be arbitrary and unreasonable. Consequently, it must be sustained as a valid exercise of the city's police power. The judgment of the trial court is reversed and judgment is here rendered dissolving the injunction.

Revered and rendered.

CLARENCE A. GUITTARD, Associate Justice

/s/Clarence A. Guittard,
CLARENCE A. GUITTARD,
Associate Justice

DELIVERED:
June 22, 1972.
NOTICE OF DECISION

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT

Jeannette Johnson, Clerk

Dallas, Texas July 13, 1972

Jake C. Cook,
Fort Worth, Texas.
Sir:

You are hereby notified that, in the case of City of Garland, Texas vs. Valley Oil Company our No. 17891, from Dallas County, the following decision and order was this day made and entered by this Court:

Appellee's motion for rehearing overruled.

Respectfully yours,
Jeannette Johnson, Clerk
Court of Civil Appeals, Fifth
Supreme Judicial District of
Texas

Appendix 1-C: Orders on the Application for Writ of Error and Motion for Re-Hearing of the Application for Writ of Error of the Texas Supreme Court.

Clerk, Supreme Court of Texas
Box J, Capitol Station [6¢ Postage Meter]
Austin, Texas 78711

OFFICIAL BUSINESS
STATE OF TEXAS

State Penalty (Nov. 8, '72)
For Private Use

This Side of Card is for Address

Mr. Jake C. Cook, Attorney
702 Burk Burnett Building
Ft. Worth, Texas 76102

CLERK'S OFFICE—SUPREME COURT

Austin Texas Nov. 8, 1972

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of Valley Oil Company vs. City of Garland, Texas, No. B-3526, was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

Clerk, Supreme Court of Texas
Box 12248, Capitol Station [6¢ Postage Meter]
Austin, Texas 78711

OFFICIAL BUSINESS
STATE OF TEXAS

State Penalty (Dec. 6, '72)
For Private Use

This Side of Card is for Address

Mr. Jake C. Cook, Attorney
702 Burk Burnett Building
Ft. Worth, Texas 76102

CLERK'S OFFICE—SUPREME COURT

Austin, Texas, Dec. 6, 1972

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of VALLEY OIL CO. v. CITY OF GARLAND, No. B-3526, was this day overruled.

Appendix 2: Ordinance #1818 of the Respondent City of Garland

ORDINANCE NO. 1818

AN ORDINANCE DECLARING A GASOLINE SERVICE STATION A NUISANCE, DETERMINING THAT IT SHOULD BE TERMINATED, PRESCRIBING A TIME FOR TERMINATION, MAKING IT A VIOLATION TO OPERATE SAME AFTER A CERTAIN TIME, PROVIDING A PENALTY, PROVIDING FOR SEVERABILITY AND PUBLICATION AND AN EFFECTIVE DATE.

WHEREAS, the Board of Adjustment of the City of Garland, after notice, has held two hearings concerning the present use of property zoned A (Agricultural District), located in the City of Garland, Texas, and has determined that that the present use of that certain property on the east line of North Glenbrook Drive opposite the intersection of Daventry Drive, Garland, Dallas County, Texas, should be abated on the following grounds:

The use of A (Agricultural District) lands at the above location as a gasoline service station is a nuisance.

The use of said land as a gasoline service station is a fire hazard.

The use of said land as a gasoline service station has been without sanitary toilet facilities in contravention of the laws of the State of Texas.

The use of said land has been without water or

sewer service.

The land has been subdivided without being platted, as required by Article 974a, VATS, and until such requirements are met, no utilities of any kind may ever be furnished to such property.

Construction on said lands has been without compliance with the building codes and regulations of the City of Garland even though the land was within 3½ miles of the city at the time developed.

A reasonable time for amortization of the non-recoverable investment is one year.

The investment, exclusive of land, is $4,000.00, and practically all of this may be removed and used elsewhere at one or more of the one-hundred or more stations of the owner.

Recoupment of land costs may be affected by sale or uses consistent with the Zoning Ordinances of the City of Garland.

The present use of the land is detrimental to the nearby property.

That the City Council of the City of Garland, after notice, has held hearings and investigated the present use of this property, and at a public hearing on July 21, 1970, the owner of the land involved, Valley Oil Company, appeared through its offices and its Attorney Jake Cook of Fort Worth, Texas;

That, based on the public hearing, the statements of the owner, through its Attorney, the report of the building official, Planning Department, Fire Depart-

ment, and investigation of the Board of Adjustment that the use of the property, except in conformity with law and permitted zoning uses, should be discontinued within one year from the date of this Ordinance;

BE IT THEREFORE ORDAINED BY THE CITY COUNCIL OF THE CITY OF GARLAND, TEXAS, that:

The use of that land (75′ X 150′) on the east line of North Glenbrook Drive opposite the intersection of Daventry Drive, Garland, Dallas County, Texas, as a gasoline service station, is a nuisance and constitutes a health and fire hazard, is detrimental to the orderly development of the area, is detrimental to the adjacent and surrounding properties and should be abated. The time for abatement shall be one year from the effective date of this Ordinance, based on the small investment of $4,000.00, most of which on the testimony of the owner, can be moved, used and salvaged in the operation of one or more of the more than one-hundred similar stations of the owner Valley Oil Company.

One year is more than a reasonable time for the discontinuance of the present use, a gasoline service station, that the permanent zoning of A (Agricultural District) does not permit this use, the Fire Code prohibits this use, the owner knew said use was contrary to zoning when he purchased the station, the station, the health, safety, morals and welfare of the community demand abatement, that the zoning laws of this state provide for the orderly development of the City, all of which are contravened by this use, that said use has been and is detrimental to the neighbor-

hood, has been and is a safety, health and fire hazard and would and should be properly abated at the time specified.

Section 2

The use of the premises, as a service station, after the expiration of one year from the effective date hereof, is a violation of this ordinance and the zoning laws of the City of Garland, constitutes a fire and health hazard and nuisance. Punishment for such violation shall be a fine not to exceed $200. per day, and each and every day shall constitute a separate violation and offense.

Section 3

The provisions of this ordinance shall be severable, and if any of said provisions be determined invalid, void, unconstitutional or fail for any reason as determined by a court of competent jurisdiction in a final, non-appealable judgment, then, and only then, those invalid provisions shall be deleted and the balance of this ordinance shall continue in full force and effect.

Section 4

The penal provisions of this ordinance shall be a partial remedy only, and the City or any aggrieved person shall have the right to have the same abated through any legal means, including summary abatement or judicial action.

Section 5

This ordinance shall be published on two occasions

in the official newspaper of this City and shall be and become effective from and after the last publication.

PASSED AND APPROVED this 4th day of August, 1970.

THE CITY OF GARLAND, TEXAS
By: /s/ Rufus Rupard
Mayor

ATTEST:
/s/ Aleta Watson
City Secretary

APPROVED AS TO FORM:
/s/ Robert E. Young
Robert E. Young
City Attorney
Published: 8/7 - 8/14/70

Appendix 3: Article 1111c, Section 2(c) Texas Penal Code

(c) Nothing in this Act or the rules and regulations promulgated pursuant to this Act shall in any manner be interpreted as prohibiting, or permitting the prohibition of, self-service gasoline station operations, so long as such stations require an attendant to be on the premises.

FILE COPY

Supreme Court, U. S.
FILED
MAR 28 1973
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of The United States

OCTOBER TERM 1972

No. 72-1202

VALLEY OIL COMPANY,

Petitioner,

v.

THE CITY OF GARLAND, TEXAS,

Respondent.

REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

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OCTOBER TERM 1972

No. 72-1202

VALLEY OIL COMPANY,

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THE CITY OF GARLAND, TEXAS,

Respondent.

REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

Respondent prays this Honorable Court not issue a Writ of Certiorari to review the Judgment and Opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, entered in this proceeding on June 22, 1972.

QUESTIONS PRESENTED

1.

The procedural questions involved are: (a) Whether or not Petitioner has brought itself within the purview of those provisions which would allow granting the Writ and (b) Whether or not the Fifth Amendment and equal protection under the

Fourteenth Amendment have a place in the Court's consideration.

2.

The only substantive question resolves itself into whether or not, under the facts, Respondent's City Council acted arbitrarily and unreasonably or in pursuance of the public health, safety, morals, or welfare.

STATEMENT OF THE CASE

So as not to unduly burden the Court in consideration of whether or not to grant the Writ, and for that purpose only, Respondent accepts Petitioner's statement of the case with two exceptions.

First, minimal factual considerations are imperative in evaluating Respondent's Reason for Denying the Writ #(c), *infra;* therefore, for convenience and clarity, such are included therein.

Second, Petitioner's conclusion (Petitioner's petition for a Writ of Certiorari, hereinafter cited as "pet.," page 9) relating to Respondent's "void ordinance absolutely prohibiting operation of self-service gasoline stations" is unsubstantiated and a fraud upon the Court as it has no basis in fact or in law.

It is presumed this statement is based on Section 2(c) of Article 1111c, Texas Penal Code (pet. pages 6 & 7). What Petitioner neglected to bring to this Court's attention was that Section 8 of this Act (properly cited Art. 1111c-1, Texas Penal Code) provides "* * * that any municipal or county ordinances, rules, or regulations in force and effect on the effective date of this Act shall not be invalidated because of any provision of this Act." Petitioner admits Respondent's ordinance on self-

service stations was adopted in 1966 (pet. page 6) and the Act was not effective until 1969 (pet. page 7).

REASONS FOR DENYING THE WRIT

(a) THE PETITIONER HAS NOT BROUGHT ITSELF WITHIN THE PURVIEW OF THE ACTS OF CONGRESS AND RULES OF THIS COURT WHICH PERMIT GRANTING SUCH WRITS.

Petitioner in its statement of jurisdiction (pet. page 2) invokes 28 U.S.C., Section 1257(3); however, at no point does it specify what provision thereof, nor does it inferentially, much less directly, attempt to bring itself within any of said provisions.

Further, Rule 19 of this Court provides the Writ is addressed to "sound judicial discretion and will be granted only where there are special and important reasons therefor." Petitioner has probably not pleaded or demonstrated any "important reasons." It clearly has not shown any "special reasons."

(b) THE FIFTH AMENDMENT AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT HAVE NO PLACE IN THIS PROCEEDING.

While Petitioner alludes to the Fifth Amendment (pet. pages 3 & 10), it is not a proper subject for consideration by this Court, as the Fifth Amendment is not a restraint on Respondent but on the government of the United States of America.

In various pleadings before the Trial Court, three proceedings before the intermediate appellate court, two proceedings before the highest appellate court of the State, and the application to stay the mandate filed with this Honorable Court, Petitioner has never mentioned "equal protection." If it is, in fact, attempting to raise the issue at this time, (pet. page 3), Respondent would

only answer that, after seven previous pleadings and proceedings, surely such has been waived and should not be given due consideration in this Court in the first instance.

(c) RESPONDENT'S ACTION WAS A VALID EXERCISE OF ITS POLICE POWER; THEREFORE, IT SHOULD BE SUSTAINED (RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE WRIT "(a)" & "(b)".

Assuming this Court feels Petitioner has surmounted the procedural inadequacies of its petition above noted in #(a), the only question to be determined is whether the subject ordinance is "clearly arbitrary and unreasonable," as it must be before it can be declared unconstitutional, or is it a proper exercise of the power to protect the public health, the public morals, the public safety, or the public welfare, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) at page 395, *Nectow v. Cambridge*, 277 U.S. 183 (1928) at page 188.

Remembering that "while the constitutional guarantees never varies (sic), the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of operation," *Euclid v. Ambler Realty Co., supra,* at page 387, that consideration of financial loss or of so called 'vested rights' in private property are insufficient to outweigh the necessity for legitimate exercise of the police power of a municipality, *Standard Oil v. City of Tallahassee,* 183 F. 2d 410, cert. denied, 340 U.S. 892 (5th Cir. 1950) at page 413 and *Geneva Inv. Co. v. City of St. Louis,* 87 F. 2d 83, cert. denied, 301 U.S. 692 (8th Cir. 1937), and that abatement of a non-conforming use is not *per se* invalid, *Standard Oil v. City of Tallahassee, supra; Swain v. Board of Adjustments,* 433 S.W. 2d 727 (Tex. Civ. App. N.R.E. 1968)

cert. denied, 396 U.S. 277, rehearing denied, 397 U.S. 977; *City of University Park v. Benners,* ..... Tex. ....., 485 S.W. 2d 773 (1972); *National Advertising Co. v. County of Monterey,* 1 Cal. 3d 875 (1970); *Board of Supervisors v. Miller,* 170 N.W. 2d 358 (Iowa-1969); *Spurgeon v. Board of Commissioners,* 181 Kan. 1008 (1957); *Grant v. Mayor & City Council of Baltimore,* 212 Md. 301 (1957); *Naegele Outdoor Advertising v. Village of Minnetonka,* 281 Minn. 492 (1968); *Wolf v. City of Omaha,* 177 Neb. 545 (1964); *Lachapelle v. Town of Goffstown,* 107 N.H. 485 (1967); *Harbison v. City of Buffalo,* 4 N.Y. 2d 553 (1958); *City of Seattle v. Martin,* 54 Wash. 2d 541 (1959); *Village of Gurnee v. Miller,* 69 Ill. App. 2d 248 (1966), was Respondent's action confiscatory, as alleged by Petitioner, or a valid police power exercise? These facts, although not exclusive, for brevity's sake, well reflect the answer:

1. That Respondent's Board of Adjustment, after two meetings with notice and hearing, transmitted certain findings to Respondent's City Council who held an additional hearing, after notice. Based on these proceedings, the Council found, as a fact, that the property was a nuisance, a fire hazard, and without water or sewer service; that it violated the sanitary laws of the State, the platting statute of the State, and the building codes of the City; that it was detrimental to the adjacent and surrounding properties; and that it was detrimental to the orderly development of the area (ordinance #1818, pet. pages 26-28).

2. That Respondent was given sufficient time to more than amortize non-land uses (ordinance #1818, pet. page 28 and Civil Appeals' opinion, pet. page 21).

3. That the Court of Civil Appeals' interpreting the laws of

the State determined Petitioner never had a non-conforming use (pet. page 18).

4. That the Court of Civil Appeals determined the City's ordinance was not arbitrary and unreasonable (pet. page 20).

5. That Petitioner purchased the land long after annexation and zoning, thereby attempting to extend and enlarge a non-conforming use.

6. That to permit a non-conforming use perpetuates a monopoly in contravention of public policy.

7. That, except for three churches, the surrounding land was totally residential in character.

8. That the only evidence that Petitioner would lose $19,000.00 on the land came in the Trial Court where testimony was offered the property was purchased for $20,000.00 and would sell for $1,000.00. This opinion should be viewed as highly suspect, as it came (over objection) from a party in interest with no expertise to appraise the property which he had not seen in one or more years. Further, he tendered no opinion on the value of the property for 41 of the 42 uses allowed under present zoning, tendered no opinion on the highest and best use of the land, and tendered no opinion on the value of the property should it be rezoned.

In evaluating these facts, Respondent would ask the Court to consider its own guidelines for reviewing zoning matters. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed, "*Euclid v. Ambler Realty Co., supra,* page 388, as the Court

is "* * * not warranted in substituting [its] judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question," *Nectow v. Cambridge, supra,* page 188; therefore, the Court "should not set aside the determination of public officers in such a matter unless it is clear the action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense'", *Nectow v. Cambridge, supra,* page 188.

CONCLUSION

For these reasons, a Writ of Certiorari should not issue to review the Judgment and Opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas.

Respectfully submitted,

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March 21, 1973